

P-3020/NA-90-90 DENYING CERTIFICATE OF PUBLIC CONVENIENCE, ORDERING
COMPANY TO CEASE AND DESIST SERVICE, AND REQUIRING NOTICE AND REFUND

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Patrice Vick	Commissioner

In the Matter of a Request for a Certificate of Convenience and Necessity to Provide Operator, Directory Assistance and Long Distance Services

ISSUE DATE: September 25, 1990

DOCKET NO. P-3020/NA-90-90

ORDER DENYING CERTIFICATE OF PUBLIC CONVENIENCE, ORDERING COMPANY TO CEASE AND DESIST SERVICE, AND REQUIRING NOTICE AND REFUND

PROCEDURAL HISTORY

On February 15, 1990, NCN Communications, Inc. (NCN or the Company) filed a petition requesting a certificate of public convenience and necessity to resell directory assistance, operator, and long distance services in Minnesota.

On June 26, 1990, the Commission issued its ORDER ESTABLISHING FILING PERIOD FOR VERIFIED INFORMATION in the present docket. In that Order the Commission referred to certain facts relevant to NCN's petition which were still in dispute. Citing concerns regarding the Company's financial stability and customer service, the Commission required NCN to submit affidavits or verified pleadings in response.

On June 28, 1990, the Commission issued a CONSENT CEASE AND DESIST ORDER directed to NCN. In that Order the Commission required NCN to cease providing service to customers in Minnesota. The Company was further required to provide certain information to the customers whose service was being terminated, and to submit compliance filings to the Commission.

On July 19, 1990, 10 days after the Commission deadline, NCN returned a signed Consent Cease and Desist Order to the Commission.

On July 23, 1990, the Department of Public Service (the Department) filed affidavits in opposition to the NCN petition.

On July 26, 1990, the Residential Utilities Division of the Office of the Attorney General (RUD-

OAG) filed comments in opposition to the Company's petition.

On the same day NCN submitted its verified informational filing addressing the questions the Commission had raised in its June 26 Order.

On August 7, 1990, the Commission met to consider this matter. At the meeting, counsel for one or more distributors of NCN Communications, Inc. requested intervenor status and a continuance for at least one week.

FINDINGS AND CONCLUSIONS

INTERVENOR STATUS AND THE REQUEST FOR CONTINUANCE

Counsel representing Jerry Klinger, a distributor of NCN, (the Distributor) requested intervenor status and a continuance of the proceedings for at least one week. According to counsel, Jerry Klinger purported to represent other distributors as well, but the other distributors were not named.

Minn. Rules, Part 7830.0600 give discretion to the presiding officer of an administrative proceeding to grant or deny intervenor status. Here the Commission has found that the viewpoint of the Distributor may shed light on the issues surrounding NCN's petition for certification. The Distributor will be directly affected by the grant or denial of NCN's request for authority. The Commission will grant the Distributor intervenor status.

The Commission will not grant the Distributor his request for a continuance. A public Commission hearing on issues surrounding NCN was held on June 12 of this year. NCN distributors should have been on notice since at least that time of the Commission's intention to address NCN's request for authority.

The Commission is also aware of the fact that between 1200 and 1300 distributors have been signed by NCN. Presumably, those distributors are engaged in efforts to sign more distributors and customers. Granting a delay in the proceedings would allow more prospective customers and recruits to be acquired by NCN distributors, compounding problems if the request for authority is denied. Good cause has not been shown for a continuance. Granting a continuance would not be in the best interest of the customers or the public.

SHOULD NCN'S REQUEST FOR AUTHORITY BE GRANTED OR DENIED?

The Commission's Authority

Under Minn. Stat. §237.16 Subd. 4, the Commission is charged with the duty of granting or denying a petition for a certificate of public convenience and necessity. The statute states in part:

Subd. 4. No company shall construct or operate any line, plant or system, or any extension thereof, or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the commission a determination that the present or future public convenience and necessity require or will require such construction, operation, or acquisition, and a new certificate of territorial authority...

In Arvig Telephone Company v. Northwestern Bell Telephone Company, 270 N.W. 2d 111 (1978), the Minnesota Supreme Court stated:

We have also held that when the Public Service Commission [the predecessor of the Public Utilities Commission] *****

considers a question of public convenience, it acts in a legislative capacity. In Dahlen Transport, Inc. v. Hahne, 261 Minn. 218, 225, 112 N.W. 2d 630, 635 (1961), we said:

***** Determination of convenience and necessity, like determination of rates, is a legislative matter. In determining the extent to which competition should be permitted, as well as the extent to which it should be limited, the commission has been legislatively granted a rather wide discretion...

The Commission therefore has express statutory authority to grant or deny a petition for a certificate of public convenience and necessity. Minnesota case law also indicates that the Commission will be granted wide latitude when deciding to grant or to deny the certificate.

The NCN Structure and Method of Operation

Organization of the Company

Facts concerning the basic structure and organization of NCN are undisputed by the parties. NCN sells telecommunications services through a multi-level marketing system. The Company uses sales agents called distributors to market its product. The distributors receive compensation based on the long distance usage of the customers they sign, plus the number of other distributors they recruit, and the number of sales training kits they sell to recruits. They are also compensated according to the number of sales training kits sold by each recruit and the long distance bills of each recruit's customers. A hierarchical compensation structure is thus created and sustained.

There are no employees of NCN situated anywhere in the Minnesota multilevel distributor organization. There are indeed no employees of NCN in the state. The approximately 1200 NCN Minnesota distributors are all independent contractors rather than employees of the Company.

An "independent contractor" is defined in Black's Law Dictionary, Revised Fourth Edition (1968) as:

One who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.

By legal definition, therefore, the NCN distributors are not under effective control by the NCN organization. Once the distributors receive their NCN sales information, they are free to sign on as many customers and fellow distributors as they are able. NCN cannot control the method by which the distributors procure and retain recruits and customers. By the same token, customers and "down-line" distributors have no recourse against NCN for false or misleading statements made by the distributors. Because they are independent contractors, the distributors have no accountability to their customers, sales recruits or to NCN.

Training of the distributors

Facts outlining the NCN method of training distributors are undisputed by the parties. Persons who wish to become NCN distributors have the option of purchasing a sales information kit. This training package consists of 2 videotapes, 2 audio cassette tapes, a "campaign"-type button, and a three ring binder containing printed materials. The only technical information provided in the training package consists of 6 photocopied pages describing the product offerings, definitions of acronyms and other terms used in the telephone industry, and the "players" in the industry. From this point on, without further training, distributors are encouraged to sell various telecommunications services to potential customers. Even if training were somehow made more complete, there is no way for NCN to require distributors to avail themselves of it. The distributors are independent contractors, not employees under control of the Company.

One example of the lack of training for NCN distributors is the handling of customers in non-equal access areas. Non-equal access areas are locations which are served by local exchange carriers which are unable to route "1+" interLATA long-distance calls to a carrier other than AT&T. NCN failed to inform customers or distributors that it could not provide service in non-equal access areas. A Department affidavit indicates that as a result of this lack of information a number of potential customers in non-equal access areas were signed up by NCN distributors.

Similar situations could occur at any time under the NCN distributor system, since an employer/independent contractor organization does not render ongoing required training possible. Such training is absolutely essential in the telecommunications industry, in which technical advances and statutory changes are constantly occurring.

Conclusion

The Commission concludes that the NCN application does not meet the standard of public convenience and necessity. NCN's multilevel marketing organization is not an acceptable means of selling regulated telecommunications systems in Minnesota. Because the distributors are independent contractors instead of employees, the Company has no means of requiring adequate training in the technical side of their product. The distributors also lack accountability to the organization, and the Company in turn lacks accountability to the customers and distributor recruits signed on by NCN distributors. The overall result is a system which is not beneficial to the distributors, the customers, or the general public. For these reasons, the Commission will deny the Company's request for a certificate of public convenience and necessity.

THE CEASE AND DESIST ORDER AND NOTICE OF REFUNDS

When originally before the Commission on June 12, 1990, the Company stated that it was providing customer service to eight customers it acquired from National Communications Network, Inc., a company which it had recently purchased. In the June 28, 1990, CONSENT CEASE AND DESIST ORDER, the Company agreed to terminate provision of service to these eight customers and to notify the customers of the termination and their options.

At the August 7 Commission meeting, counsel for NCN revealed that the Company has been providing service to "many more" than eight customers, and that the Company had not yet provided its counsel with a list of its Minnesota customers. Although the deadline for notice which was part of the June 28 Order had been verbally extended by Commission counsel, the extended deadline had not been met.

NCN has failed to live up to the agreement which was part of the June 28 CONSENT CEASE AND DESIST ORDER. The June 28 Order was premised on the Company's assertion that it served 8 Minnesota customers. The Commission is now informed that the Company serves "many more" than 8, although the number has not even been determined. No notice has been sent to the customers under the Order deadlines, and no customer service has been terminated. Because NCN is not conforming to the previous CONSENT CEASE AND DESIST ORDER, the Commission will now issue a Cease and Desist Order requiring the Company to stop providing service to any customer in Minnesota. The Company will also be required to inform customers that they will receive refunds for payments made prior to certification.

ORDER

1. NCN's request for a certificate of public convenience and necessity to resell directory assistance, operator, and long distance services in Minnesota is hereby denied.
2. Within 21 days of the date of this Order, NCN shall cease and desist its provision of telephone service to the customers it currently serves in Minnesota.
3. No later than 14 days prior to the effective date of the termination, NCN shall notify the aforesaid customers in writing of the date of the termination, and provide these customers with information regarding their options to secure continued service directly with MCI or another authorized long distance carrier of their choice; the information will include telephone numbers for the service offices of available long distance carriers. The notice shall also inform the customers that they will receive refunds for payments previously made.
4. Within seven days of the termination date as provided in Paragraph 2 above, NCN shall file a report including a list containing the names and mailing addresses and phone numbers of each of the terminated customers and a copy of all written materials provided to the customers in conjunction with the termination.
5. Within 45 days of the termination date as provided in Paragraph 2 above, NCN shall submit

a compliance filing stating that the aforementioned notices have been provided and that refunds of all pre-certification payments have been made to all Minnesota customers.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)